**YUSUF ABDUL RAHMAN** *a*

**v.**

**ABDUL AJIS ABDUL MAJEED & ANOR**

HIGH COURT SABAH & SARAWAK, SIBU *b*
IAN HC CHIN J
[ELECTION PETITIONS NOS: 20-26-1-1996 & 20-26-2-1996]
27 FEBRUARY 1997

***ELECTION:*** *Petition - Filing - Whether premature as allegation of corrupt practices took place before publication of election results - Election Offences Act 1954, s. 38(1)* *c*

***ELECTION:*** *Petition - Service - No personal service - No advocate appointed or address given for service - No publication of notice of petition in gazette or newspaper - No posting of service of petition on notice board of High Court - Whether service proper in view thereof* *d*

***ELECTION:*** *Petition - Filing - Filed after 21 days requirement under s. 38(1) Election Offences Act 1954 - Whether out of time - Whether petition dismissed*

The petitioner, an independent candidate for the Sarawak State Constituency took out two election petitions against the 1st respondent, the other candidate in the contest who stood on a Barisan Nasional ticket. The 2nd petition included the 2nd respondent who was the returning officer. *e*

The issues were: (i) whether there was a premature institution of the 1st petition and whether its service proper; and (ii) whether the 2nd petition was filed out of time. *f*

**Held:**

**[1]** Upon examination of the particulars of corrupt practices of the 1st petition, every allegation to support the 1st petition related to events that had taken place before the publication of the election results in the *Gazette.* Thus, s. 38(1)(a) of the Election Offences Act 1954 could not be invoked to validate the premature filing of the 1st petition since that section related only to corrupt practices that took place after the said publication. Further, the petition was not filed within 21 days after the election results were published. *g* *h*

**[1a]** There was improper service of the 1st petition as: (i) there was no personal service of the petition; (ii) no advocate appointed or address given under r. 10 of the Election Petition Rules 1954 for the petition to be served; (iii) no publication in either the *Gazette* or a newspaper *i*

of a notice of the petition and that a copy might be obtained from the Registrar of the High Court; and (iv) no posting within the said time of a notice of the petition on the notice board of the High Court intimidating that a copy of the petition might be obtained from the Registrar.

**[2]** The 2nd petition was filed out of time after the election result was published in the *Gazette*, *ie*, more than 21 days allowed by s. 38(1) of the Act. When an election petition is filed beyond time, it has to be dismissed *in limine*. As for the plea to extend the time, the court had no such power.

*[Petitions dismissed with costs.]*

**Case(s) referred to:**
*Chong Thain Vun v. Watson & Anor (and 2 Other Cases) [1968] 1 MLJ 65* ***(refd)***
*Government of State of Pahang v. Tengku Abdul Aziz & Anor [1978] 2 MLJ 34* ***(refd)***
*Nair v. Teik [1967] 2 All ER 34 PC* ***(refd)***
*Ramnandan Rai v. The District Judge, Sitamarhi & Ors AIR [1980] Patna 180* ***(refd)***
*Rhina Bhar v. Karpal Singh [1995] 4 CLJ 642* ***(refd)***
*Sabdin Ghani v. Mohamed Saidi Lampoh & 25 Other Petitions [1983] 2 MLJ 61* ***(refd)***
*Tengku Korish v. Mohamed Jusoh & Anor (and 2 other cases) [1970] 1 MLJ 6* ***(refd)***

**Legislation referred to:**
Election Offences Act 1954, s. 38(1)(a)
Election Petition Rules 1954, rr. 10, 15
Rules of the High Court 1980, O. 54 r. 22A

*Petitioner in person*
*For the 1st respondent - Dr Cyrus Das (Sim Hui Chuang & Awang Bemee with him); M/s Awang Lai & Co*
*For the 2nd respondent - Raja Ahmad Faridz Raja Mazlan; SFC*

*Reported by Usha Thiagarajah*

**JUDGMENT**

**Ian HC Chin J:**

***Introduction***

Yusuf Abdul Rahman ("the petitioner"), the independent candidate for the Sarawak State Constituency seat of N45 Balingian, took out two election petitions. The first petition ("the first petition) was taken out on 30 September 1996 and the other ("the second petition") on 26 October 1996. Both petitions were against Abdul Ajis Abdul Majeed ("the first respondent"), the other candidate in the contest and who stood on a Barisan Nasional ticket. The

second petition included another respondent the returning officer Liaw Foon Eng ("the second respondent"). The election was held on 7 and 8 September and the winning candidate is the first respondent. The election result was published in the *Gazette* on 3 October. This sequence of the events gave rise to one of the contention that the petitions ought to be dismissed *in limine* and it is to that issue that I will now turn to.

***Premature Institution Of The First Petition***

Dr Das, learned counsel for the first respondent submitted that the first petition having been filed before the election result was published in the *Gazette* was premature and a nullity. This contention turns on the meaning to be given to s. 38(1) of the Election Offences Act 1954 which says:

> 38. Time for presentation
>
> (1) Every election petition shall be presented within twenty-one days of' the date of publication of the result of the election in the *Gazette:*
>
> Provided that –
>
> (a) an election petition questioning the return or the election upon the ground of a corrupt practice and specifically alleging a payment of money or other act to have been made or done since the date aforesaid by the person whose election is questioned or by an agent of the person or with the privity of the person or his election agent in pursuance or in furtherance of such corrupt practice may, so far as respects such corrupt practice, be presented at any time within twenty-eight days after the date of such payment or act;

This section was considered and interpreted in *Tengku Korish v. Mohamed Jusoh & Anor (and 2 other cases)* [1970] 1 MLJ 6, a case cited by Dr. Das. The facts of that case were these. The petitioners' nomination papers were rejected resulting in the declaration of the candidates whose papers were accepted as elected and returned. The petitioners then filed their election petitions on 23 April 1969 and it was only thereafter that the election result was published in the *Gazette* on 8 May 1969. Raja Azlan Shah J (as His Royal Highness then was), at p. 7, gave a succinct statement regarding the meaning to be placed on those words, *viz*:

> It is now necessary to put a construction upon the provisions of section 38(1) of the Election Offences Act 1954 and regulation 10 of the Elections (Conduct of Elections) Regulations, 1959. Regulation 10 enacts that after determination by the returning officer of any objections which may have been lodged, only one candidate stands nominated, he shall forthwith declare him to be elected and shall forthwith make a return in the prescribed form to the Supervisor of Elections, who in turn shall cause the same to be gazetted. It cannot be said that the return of the successful candidate is made as soon as the returning

officer declares him to be elected or signs the prescribed form. It seems to me that the true meaning of the regulation is that the return is made when the returning officer sends the prescribed form to the Supervisor of Elections who on receipt of it acts upon it in the sense required by the regulation. Now, what has the Supervisor of Elections to do upon a return being made to him? He has to gazette the name. In this sense a return is only complete when it reaches the hands of the Supervisor of Elections, so that he can act upon it as is required by law. Now, section 38(1) uses peremptory language and provides a remedy which must be taken to mean what it says, that no court of law is to recognise a petitioner having a right of law until after the date of publication of the election result in the *Gazette*. The word "of" in this context is no different from the word "after".

For these reasons the petitioners, under the compulsion of the Act, must present their petitions twenty-one days 'after' the date of publication of the election result in the *Gazette*.

The present case deals with the same said s. 38(1) and no reason had been offered as to why I should differ from that case. The petitioner acting for himself did not advert to the case but argued that the first petition comes within s. 38(1)(a) which I have already set out. The petitioner therefore asserted that the first petition concerns corrupt practices that had taken place after the publication of the election result in the *Gazette* which was 3 October. This calls for an examination of the particulars of corrupt practices of the first petition. These have been stated in para. 3 in Bahasa Melayu the following terms:

(i) Pada hari Ahad bersamaan 1hb September 1996 bertempat di alamat rumah Responden di Kampung Telian Laut, 96400 Mukah, Sarawak, Responden dengan sendirinya telah memberi wang tunai berjumlah Ringgit Malaysia Tiga Puluh (RM30.00) kepada setiap orang pemilih-pemilih atau pengundi-pengundi yang berdaftar di Kod Daerah mengundi 186/45/03 – Tilian yang datang ke rumah Responden pada hari dan tarikh tersebut dengan maksud secara rasuah mendorong setiap orang pemilih atau pengundi tersebut supaya mengundi Responden atau secara rasuah mendorong setiap orang pemilih atau pengundi tersebut supaya tidak mengundi Sipetisyen dalam Pilihanraya tersebut;

(ii) Pada hari Khamis bersamaan 5hb September 1996 ejen-ejen Responden iaitu Haji Nawabdeen Bin Saiyidahamed, Bendahari Bahagian dalam Parti Bumiputra Bersatu, Bahagian Mukah, Sarawak dan Spawi Bin Hj Hussin, Pegawai Penerangan dalam Parti Bumiputra Bersatu, Bahagian Mukah, Sarawak telah memberi wang tunai berjumlah Ringgit Malaysia Dua Ratus (RM200) dalam bentuk empat (4) keping wang tunai bernilai Ringgit Malaysia Lima Puluh (RM50.00 setiap satu dan mempunyai siri No. AU7716046, BA4791739, AV5487528 dan AV3229241 yang diisi dalam satu sampul surat kepada seorang pemilih atau pengundi berdafter di Kod Daerah mengundi 186/45/01.

– Petanak di rumah pemilih atau pengundi tersebut dengan maksud secara rasuah mendorong pemilih atau pengundi tersebut supaya memilih atau mengundi Responden atau secara rasuah mendorong pemilih atau pengundi tersebut supaya tidak memilih atau mengundi sipetisyen dalam pilihanraya tersebut;

(iii) Pada hari Khamis bersamaan 5 September 1996, ejen responden iaitu Omar Bin Driss @ Sirat Bin Driss telah memberi wang tunai berjumlah Ringgit Malaysia Lima Puluh (RM50) kepada seorang pemilih atau pengundi berdaftar di Kod Daerah mengundi 186/45/03 - Tillian di rumah pemilih atau pengundi tersebut dengan maksud secara rasuah mendorong pemilih dan pengundi tersebut supaya memilih atau pengundi responden atau secara rasuah mendorong pemilih atau pengundi tersebut supaya tidak memilih atau mengundi sipetisyen dalam pilihanraya tersebut; dan

(iv) Responden telah dengan sendirinya atau melalui ejennya meluluskan dan mengunakan wang Kerajaan untuk melaksanakan beberapa projek kilat dalam tempuh masa selepas hari penamaan calon dan sebelum hari Pilihanraya tersebut dijalankan khususnya di Kampung Petanak, Mukah, Sarawak dengan maksud secara rasuah mendorong atau memancing undi permilih atau pengundi berdaftar di Kampung Petanak tersebut dengan cara memberi balasan bernilai supaya pemilih atau pengundi responden atau secara rasuah mendorong pemilih atau pengundi tersebut dengan cara memberi balasan bernilai tersebut supaya tidak memilih atau mengundi Sipetisyen dalam Pilihanraya tersebut.

Paragraph 3(i), (ii) and (iii) state expressly the corrupt practices to have been committed, respectively, on 1 September, 5 September and 5 September while para. (iv) states the corrupt practice to have taken place between nomination day and polling day, that is before 9 September. The other events complained of were stated in para. 3(b)(i) to have occurred on 1 September and in para. 3(c) to have taken place before polling day. Clearly then every single allegation to support the first petition relates to events that have taken place before publication of the *Gazette*. That being the case, I do not see the relevance of 38(1)(a) and therefore I cannot see how that section can be invoked to validate the premature filing of the first petition since that section relates only to corrupt practices that took place after the publication of the *Gazette* which date was 3 October which is not the case with the corrupt practices alleged in the first petition. A similar construction, that is that the petition must he presented within 21 days of the date of publication of the election result, was also made in *Rhina Bhar v. Karpal Singh* [1995] 4 CLJ 642. I see no reason to depart from such a construction. Therefore, the first petition ought to be dismissed since it was not filed within 21 days after the election result was published in the *Gazette*. But there is another meritorious ground upon which the first petition ought to be dismissed and it is to that ground that I turn to.

*Improper Service Of The Petition*

The facts relating to this issue are these. A copy of the first petition was posted by registered mail to the first respondent on 7 October at which time the first respondent had not under r. 10 of the Election Petition Rules 1954 left with the Registrar of the High Court an address to which notices may be served on him. Because such an address was not indicated postal service cannot be had so submitted Dr Das. Learned counsel relied on *Nair v. Teik* [1967] 2 All ER 34 PC which, among others, considered r. 10 and 15 of the Election Petition Rules 1954 whose terms are as follow:

10. **Appointment of advocate by respondent.**

Any person returned may at any time, after he is returned, send or leave at the office of the Registrar a writing, signed by him, appointing an advocate to act for him in case there should be a petition against him, or stating that he intends to act for himself, and in either case giving an address within Malaysia at which notices addressed to him may be left. Every such writing shall be stamped with the duty payable thereon under the law for the time being in force.

15. **Notice of petition and copy of petition to be served on respondent.**

Notice of the presentation of a petition, accompanied by a copy thereof, shall, within fifteen days of the presentation of the petition, be served by the petitioner on the respondent. Such service may be effected either by delivering the notice and copy aforesaid to the advocate appointed by the respondent under rule 10 or by posting the same in a registered letter to the address given under rule 10 at such time that, in the ordinary course of post, the letter would be delivered within the time above mentioned, or if no advocate has been appointed, or no such address given, by a notice published in the *Gazette* or in a newspaper circulating within the constituency or electoral ward in which the election was held, or posted on the notice board of the High Court in the State in which that constituency or electoral ward is situated, stating that such petition has been presented, and that a copy of the same may be obtained by the respondent on application at the office of the Registrar.

In that case no advocate was appointed nor address left under r. 10. An attempt at service was made by lodging a copy of the petition on the Registrar on the last day for service prescribed by r. 15. A notice of presentation of the petition was advertised in the *gazette* out of time. The Privy Council held that a petition must be served in accordance with the terms of r. 15 and that service merely in accordance with r. 10 is insufficient. It was also held there that r. 15 was not complied with as there was no personal service and no notice in the *Gazette* within 10 days of the presentation of the petition and that the provisions of r. 15 are mandatory. That case was followed in *Chong Thain*

*Vun v. Watson & Anor (and 2 Other Cases)* [1968] 1 MLJ 65 where it was held that the Election Petition Rules are mandatory requiring strict compliance and that non-compliance would result in a jurisdictional defect resulting in the court not having power to entertain the petition. That case was also of the view that service can be effected personally. On the authorities cited which I am inclined to follow, it is my view that the following results regarding service are obtained as a result of the interpretation of rr. 10 and 15 by those cases, *viz.*;

(1) notice of the presentation of a petition accompanied by a copy of the petition may be served personally on the respondent within 15 days of the presentation of the petition; or

(2) notice of the presentation of a petition accompanied by a copy of the petition may be served within the said time by delivering them to the advocate appointed by the respondent under r. 10; or

(3) notice of the presentation of a petition accompanied by a copy of the petition may be served by posting (within a time that ensures delivery within the said time) the same in a registered letter to the address given by the respondent under r. 10; or

(4) by publishing in the *Gazette* or a newspaper circulating in that constituency within the said time a notice stating such a petition had been presented and that a copy may be obtained by application to the Registrar of the High Court; or

(5) by posting within the said time on the notice board of the High Court of the State in which the constituency was situated a notice stating such a petition had been presented and that a copy may be obtained by application to the Registrar of the High Court.

Those requirements are mandatory with the result that a failure to comply with them would result in the petition being liable to be struck out *in limine*. As for (1), it is common ground that personal service was not made. As for (2) and (3), it is also common ground that no advocate was appointed nor address given for the purpose of r. 10 which means the petitioner cannot rely on postal service. As for (4), it was also not complied with since there was no publication in either the *Gazette* or a newspaper. As for (5), there was an attempt at complying when the petitioner requested the Registrar by a letter dated 7 October to post on the notice board a copy of the first petition but the rule requires the posting not of a petition but of a notice thereof intimidating that a copy of the petition can be obtained from the Registrar. Therefore, the petitioner had failed to comply with any of the statutorily prescribed mode of the service with the result that the court has no jurisdiction.

For this reason too, the first petition must be struck out. I turn now to the argument relating to the second petition.

***Filed Out Of Time***

The situation presented in this case will find no parallel because incredibly the petitioner went from filing a petition too early to filing a petition too late. It is common ground that the second petition was filed out of time. The second petition was filed, it will be recalled, on 26 October after the election result was published in the *gazette* on 3 October and thus it was presented more than the 21 days allowed by s. 38(1) of the Election Offences Act 1954. When an election petition is filed beyond time it has to be dismissed *in limine* (*Ramnandan Rai v. The District Judge, Sitamarhi & Ors AIR* [1980] Patna 180). The petitioner implored the court to extend the time since, according to him, it would not cause any embarrassment, prejudice or injustice to the two respondents and he added, after citing *Government of State of Pahang v. Tengku Abdul Aziz & Anor* [1978] 2 MLJ 34, that justice would not be served by acceding to objections on technicalities for non-compliance. That case deals with non-compliance with O. 54 r. 22A of the Rules of the High Court and I do not, with all due respect, see its relevance when it is not concerned with the mandatory provisions of the Election Offences Act 1954. Also of no relevance is *Sabdin Ghani v. Mohamed Saidi Lampoh & 25 Other Petitions* [1983] 2 MLJ 61, another case cited by the petitioner, as that case dealt with misdescription in the body of a petition. The present case deals with the mandatory provisions of a statute prescribing the time within which a petition must be presented and not with the Rules of the High Court nor with the particulars in the petition. As for the plea to extend the time, my answer is that the court has not such power (*Nair v. Teik; Chong Thain Vun v. Watson & Anor (and 2 other cases)*). Therefore, the second petition ought also to be dismissed.

***Conclusions***

Since what I have decided is sufficient to dispose of the petitions herein I do not propose to go into the arguments of Mr. Raja Ahmad Faridz bin Raja Mazlan, Senior Federal Counsel, for the second respondent, but meaning no disrespect. In the premises I dismiss the first petition and the second petition with costs to the first respondent. There will only be costs at 50% to the second respondent because the authorities were handed to the court only on the day of the hearing and not as provided by a directive of the Registrar, which is at least three days before the hearing.